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No. 86-1622

# In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

*v.*

CARL A. FUCCILLO

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## REPLY MEMORANDUM FOR THE UNITED STATES

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In our petition, we contended that the court of appeals' judgment upholding the suppression of evidence in this case misread this Court's decision in *United States* v. *Leon,* 468 U.S. 897 (1984), in two important respects. First, by holding that the good faith exception requires agents to " 'take every step that could reasonably be expected of them' " (Pet. App. 11a), the court of appeals—in marked contrast to the approach followed in other circuits—effectively held the agents in this case to a standard of near perfection in the drafting of search warrants. Second, by holding that agents cannot be acting in good faith when they have seized some items that are outside the four corners of the warrant, the court of appeals created a novel exception to the good faith rule nowhere contemplated by the *Leon* decision.

1. Respondent endorses (Br. in Opp. 5-6) the court of appeals' conclusion that agents do not act in good faith unless they have taken every reasonable step to particularize a warrant. But like the court of appeals, respondent fails to explain how such an exacting standard can possibly be squared with the *Leon* decision. The Court

made it clear in *Leon* that the good faith exception applies unless "a warrant [is] * * * so facially deficient—*i.e.*, in failing to particularize the * * * things to be seized—that the executing officers cannot reasonably presume it to be valid" (*Leon*, 468 U.S. at 923). In so stating, the Court plainly did not intend warrants to be found "so facially deficient" every time a reviewing court can imagine some "reasonable step" that the agents might have taken to narrow the warrant still further.[1]

2. Respondent attempts unsuccessfully to show that the court of appeals' grudging application of *Leon* is consistent with the approach adopted by other circuits.[2] He distinguishes (Br. in Opp. 6-7) the decision of the Second Circuit in *United States* v. *Buck*, 813 F.2d 588 (1987), contending that the search in the *Buck* case was executed prior to the decision in *Leon*, while the search in this case took

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[1] The court of appeals itself proposed two such "reasonable steps" (Pet. App. 11a-12a), but as we showed in the petition (Pet. 10-11), narrowing the warrants in those ways would have omitted much, if not all, of the stolen property that the agents clearly had probable cause to seize. Respondent now claims (Br. in Opp. 6) an inability "to fathom" how adding the words "Casual Corner clothing" could have caused the warrants to omit most of the stolen apparel. As we explained in the petition (Pet. 3), the affidavit for the search warrants established that the labels on some of the clothing had been removed prior to the search. Moreover, retaining the Casual Corner labels in the garments would have been virtually an admission that the clothes were stolen. Under these circumstances, the agents' decision to draft the warrants without a reference to Casual Corner was not unreasonable. And still less was it an exercise of bad faith to rely on the magistrate's determination that the warrants, as drafted, were sufficiently particularized.

[2] Respondent does not address the conflict between the decision of the court of appeals in this case and the decisions of the Eighth Circuit in *United States* v. *Faul*, 748 F.2d 1204 (1984), cert. denied, 472 U.S. 1027 (1985), and the Ninth Circuit in *United States* v. *Michaelian*, 803 F.2d 1042 (1986).

place after *Leon*. We fail to understand the relevance of that distinction. Certainly the Second Circuit did not appreciate any such distinction, since it expressly read the First Circuit's decision in this case as in conflict with its own decision (see 813 F.2d at 592 n.1). More generally, we cannot imagine how the timing of the *Leon* decision could possibly bear on whether an agent drafted a warrant in good faith. There is no plausible reason why a warrant drafted after *Leon* is, for that reason, more likely to have been prepared in bad faith than a warrant that preceded that decision.

Respondent also contends that unlike in *Buck* the agents in this case "had available to them established rules for drafting so-called 'generic' warrants" (Br. in Opp. 7). But as we showed in the petition (Pet. 12-13 & n.6), each of the First Circuit cases cited by respondent as a source of the "established rules" had identified the Second Circuit's decision in *United States* v. *Scharfman,* 448 F.2d 1352 (1971), cert. denied, 405 U.S. 919 (1972), as an example of a sufficiently particularized warrant. Respondent fails to show how the warrant in the *Scharfman* case is any different from the warrants issued in this case.[3] More fun-

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[3] Respondent distinguishes *Scharfman* (Br. in Opp. 7-8) on the ground that the informant in that case had more "experience[]" than the informant in this case in identifying the particular stolen merchandise. But the Second Circuit in *Scharfman* did not even refer to the expertise of the informant in upholding the particularity of the warrant. Moreover, there is no evidence in this case—and none was presented to the magistrate—to substantiate respondent's claim (Br. in Opp. 8) that the informant in this case "was not an expert in the field of women's clothing." Respondent also asserts (*ibid.*) that in this case, unlike in *Scharfman,* there was no evidence presented to the magistrate showing that stolen goods made up a significant part of respondent's inventory. But that is not so: in a 10 to 15 minute perusal of FOT alone, Ms. Sweeney observed some $6,000 worth of Casual Corner merchandise that should not have been for sale on the premises.

damentally, even if the warrants in this case had strayed from the First Circuit's rules for generic warrants, surely that was a legal judgment for the magistrate, not the agents, to make. Like the court of appeals, respondent would hold agents to a standard of legal sophistication that would invariably require them "to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient" (*Leon*, 468 U.S. at 921).

Respondent contends that the Eleventh Circuit's decision in *United States* v. *Accardo*, 749 F.2d 1477 (1985), cert. denied, No. 85-518 (Nov. 4, 1985), is not in conflict with the decision in this case because the nature of the offense in *Accardo*—a "complex financial fraud" (Br. in Opp. 8)—justified the agents' reliance on broad search warrants. Respondent misreads the *Accardo* case. To be sure, in explaining why the agents had acted in good faith despite having drafted warrants that were broader than the warrant approved in *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984), the Eleventh Circuit noted (749 F.2d at 1481) that the type of crime "has been held to justify a more flexible reading of the fourth amendment." But the court of appeals in *Accardo* plainly did not predicate its good faith holding on that ground. Rather, the court held (749 F.2d at 1480)—in sharp contrast to the First Circuit in this case—that the agents had "submitted a detailed affidavit to a magistrate * * * who found probable cause and issued the warrants." Moreover, the Eleventh Circuit made clear (*id.* at 1481) that even if the warrants could have been more narrowly drafted, "this is not dispositive. The question here is not the legal validity of the warrant but the reasonableness of the officers' reliance on it."

3. Respondent concedes (Br. in Opp. 9) that the court of appeals held, as a matter of law, that the good faith exception is unavailable whenever agents have seized some items outside the scope of the warrant. Respondent con-

tends (*id.* at 9-10) that such a limitation on the good faith exception is implicit in the *Leon* decision, but he cites no support for that proposition other than to quote out of context the same sentence mistakenly relied on by the court of appeals (see Pet. App. 11a; see also Pet. 17 n.11). Respondent also contends that the agents' execution of the warrants amounted to "flagrant and deliberate misconduct" (Br. in Opp. 9). As a preliminary matter, we do not see how the agents' execution of the warrants can possibly bear on whether the warrants were drafted with sufficient particularity to justify a finding of good faith. Moreover, respondent's characterization of the agents' execution practices is wholly unjustified. The fact that the agents brought experts from Casual Clothing to assist in the searches demonstrates, if anything, the agents' effort to cause the smallest feasible disruption to respondents' inventory. The fact that the agents removed items of clothing from racks and placed them into cartons proves only that they were doing their job; it hardly merits the extravagant claim (Br. in Opp. 12) that the agents were engaged "in a transparent attempt to comply with the dictates of the warrant." And while it is true that the agents seized certain items in plain view that were not mentioned in the warrants, they did so only after first discovering probable cause to believe that a substantial portion (and, as far as the agents could determine during the search, the entire portion) of those items was also stolen (see Pet. 4-5).

For the foregoing reasons and those stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
*Solicitor General*

MAY 1987